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CHARLES ELMORE CROPLE
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IN THE

Supreme Court of the United States

October Term, 1951

No. 505

PETER DURYEE, Trustee of the Property of The New Jersey and New York Railroad Company,

Petitioner,

vs.

ERIE RAILROAD COMPANY, JOHN A. HADDEN, C. E. DENNEY and ROBERT E. WOODRUFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 27, 1951.

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Petitioner, Peter Duryee, Trustee of the Property of The New Jersey and New York Railroad Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on October 19, 1951, affirming a judgment of the District Court of the United States for the Northern District of Ohio, Eastern Division, granting summary judgment against petitioner (R. 108-109).*

* References noted as such are to pages of the transcript of record. References (fol.) are to the transcript of record by folio number. References to pages of the Erie Reorganization Record are referred to as (E.).

Opinions Below

The decision of the Court of Appeals which was without opinion (R. 129, *et seq.*) is reported in 191 F. 2d 855. The opinion (R. 42-48) of the District Court (Freed, J.) is reported in 91 F. Supp. 1009.

Jurisdiction

The judgment of the Court of Appeals was entered on October 19, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254 (1) and 2101 (c).

Questions Presented

1. Whether under Rule 56 of the Federal Rules of Civil Procedure it is permissible to make summary disposition against petitioner on the ground that a "bar order" obtained by respondent Erie under Section 77 of the Bankruptcy Act is a complete defense to the plaintiff's action regardless of the nature or extent of any fraud that may have been practiced upon the court in the procurement of that "bar order."

2. Whether the courts below committed reversible error in holding that the plaintiff's claim was barred by prior decisions.

3. Whether, where a reorganization proceeding under Section 77 of the Bankruptcy Act has been transferred from one district court to another and the trustees appointed by the first court have been discharged, the limitation of Section 11(d) of the Bankruptcy Act applies to suits against said trustees before the transferred reorganization proceedings are terminated.

Statutes and Rules Involved

The pertinent provisions of Sections 11(d) and 77(g) of the Bankruptcy Act (11 U. S. C. § 29d and § 205g), as amended, are set forth in Appendix "A" *infra*, page 15.

The pertinent provisions of Rule 56 of the Federal Rules of Civil Procedure are set forth in Appendix "B", *infra*, pages 15-16.

Statement

Case at Bar

Petitioner is Trustee of the Property of The New Jersey and New York Railroad Company (hereinafter called "The New Jersey") in reorganization under Section 77 of the Bankruptcy Act in the United States District Court for the District of New Jersey. On September 19, 1949 he instituted the present action against respondent Erie Railroad Company (hereinafter called "Erie") and the individual respondents in the United States District Court for the Northern District of Ohio, Eastern Division (hereinafter called "the district court" or "the district court in Ohio").

The complaint (R. 2-16) alleges in substance that the Erie during the period from December 4, 1912 to June 30, 1938, and the individual respondents John A. Hadden and Robert E. Woodruff, as trustees of both the Erie and The New Jersey in reorganization, for the period from June 30, 1938 to December 30, 1941, dominated, controlled, managed and operated The New Jersey as a mere department and adjunct and instrumentality of said respondent Erie, and that said management and operation was in violation of said respondents' respective trusts, fiduciary obligations, and duties to the stockholders and creditors of The New

Jersey, being a part of a fraudulent conspiracy and plan to despoil the assets and property of The New Jersey. It further alleges that said respondents, in order to benefit and unjustly enrich respondent Erie, intentionally defrauded the stockholders and creditors of The New Jersey. The fraud and spoliation alleged was accomplished by operating agreements, equipment leases, service charges, freight rate divisions and advertising, and other miscellaneous agreements, all of which were unfair and inequitable to The New Jersey resulting in losses in excess of 10 million dollars to said company with corresponding benefits to the respondent Erie. The complaint prays for an accounting and payment of the damages suffered (fol. 35).

Petitioner served notice of taking depositions of the respondents for discovery purposes pursuant to Rule 26, *et seq.* of the Federal Rules of Civil Procedure (R. 17). The respondents filed no answer to the complaint but in lieu thereof served a motion for summary judgment (R. 19) on the ground that petitioner's claims were barred by prior decisions of the district court (fol. 57), orders of the district court sitting in bankruptcy in case No. 45839 entitled *"In the Matter of the Erie Railroad Company, Debtor in Reorganization"* and applicable provisions of the Federal Bankruptcy Statutes (fol. 58).

Respondents moved pursuant to Rule 30(b) of the Federal Rules of Civil Procedure to postpone the taking of depositions by the petitioner (R. 23). Petitioner moved pursuant to Rule 56(f) of the Federal Rules of Civil Procedure for continuance of the motion for summary judgment until petitioner had been granted an appropriate opportunity for taking depositions, discovery, inspection of documents, preparation of affidavits and exhibits in opposition to said motion for summary judgment (R. 34).

A hearing was held before the district court on January 9, 1950. While the respondents had filed no answer raising any affirmative defenses, at said hearing they re-

lied strongly on an order (Order No. 386) entered in the *Erie Reorganization* case (E. 4809-73), referred to in the record as the "bar order" (R. 64-65).

In answer to this affirmative defense, petitioner contended that the "bar order" was no defense to his cause of action since it was obtained by a fraud on the court (R. 74). To substantiate his claim, plaintiff sought the benefit of all discovery procedures provided for in the Rules (R. 74). This issue was specifically presented as shown by the following colloquy and became the main bone of contention:

> "The Court: That is one contention. If your contention is that, what you are seeking to show by the depositions is a fraud on the court—that is one thing. If you are seeking to show fraud, that is another proposition.
>
> Mr. Buell: No. I am seeking to show fraud on the court, so the 'bar order' doesn't apply to us. The other fraud is alleged in the complaint" (R. 84).

The District Judge filed his memorandum opinion June 30, 1950 directing summary judgment for all respondents (R. 42-48). Petitioner thereafter filed and served his motion for rehearing and reargument with supporting affidavits and exhibits (R. 49-103). This motion was overruled on August 28, 1950 without further hearing (R. 117). Final judgment was entered in the district court on August 28, 1950, granting summary judgment in favor of all respondents (R. 108-109).

Petitioner appealed from said judgment to the Court of Appeals for the Sixth Circuit (R. 118). On October 19, 1951 the Court of Appeals rendered its decision and judgment affirming without opinion the judgment of the district court (R. 129, *et seq.*), for the reasons stated in the opinion of that court.

Prior Litigation

In granting summary judgment in favor of respondent Erie, the district court took judicial notice of and relied upon three prior decisions by that court (R. 43-45). These were *Beckley* v. *Erie Railroad Co.* (No. 24343), *Duryee* v. *Erie Railroad Comany* (No. 24855) and *In Re Petition of Charles Massie* for Order No. 442 in Erie Reorganization Proceedings (45839). All three were decided in one opinion 76 F. Supp. 635 (1948), notwithstanding they were separate actions. Beckley and Duryee appealed to the court of appeals which affirmed. The opinions are reported in 175 F. 2d 58, 64 (1949). Duryee's petition for certiorari was denied by this court in 338 U. S. 860 (1949).

The *Duryee* case asserted a cause of action against Erie based upon the "instrumentality doctrine" seeking to have debts of The New Jersey in excess of one million dollars declared to be debts of the parent Erie because of the complete domination and control exercised by Erie over The New Jersey which made the latter a mere department of the former. The complaint did not allege fraud. This cause of action was authorized by the first numbered paragraph (fol. 40) in an order entered by United States District Court for the District of New Jersey, *In the Matter of The New Jersey and New York Railroad Company*, No. 2480 a (R. 13-16).

The *Beckley* case was a suit by certain bondholders of The New Jersey seeking to establish a constructive trust under which the funded debt of The New Jersey would be declared an obligation of Erie. The complaint alleged that Erie had intentionally so managed The New Jersey as to despoil it of all its profits and earnings for the benefit of Erie and, therefore, defrauded The New Jersey's bondholders. Petitioner was not a party to this case. There was no allegation in the Beckley suit that the "bar order" had been obtained by fraud on the court and that issue was not litigated.

The Massie petition, on behalf of certain bondholders of The New Jersey, was filed in the Erie Reorganization proceedings and sought to modify the "bar order" so as to permit plenary suit against Erie for claims of The New Jersey resulting from Erie's mismanagement. The Massie petition did allege fraud against the reorganization court in obtaining the so-called "bar order" (fols. 129-31). Petitioner was not a party to this petition.

Erie Reorganization

In January, 1938, respondent Erie petitioned the district court of Ohio for reorganization under Section 77 of the Bankruptcy Act. Six months later, The New Jersey petitioned the same for reorganization as part of the parent Erie's reorganization (E. 585-88). The two trustees of the Erie, one of whom was its president, and also president of The New Jersey, were also appointed as trustees of The New Jersey (E. 735-39).

A Plan of Reorganization of the Erie was confirmed by the court in Ohio in June, 1941, but no Plan for reorganizing The New Jersey was proposed (E. 3783-98). The trustees petitioned for the dismissal of The New Jersey from the Erie reorganization proceeding (E. 4213-19). However, no attempt was made to comply with the prerequisites to a dismissal of such a proceeding required by Section 77(g) of the Bankruptcy Act (See Appendix "A"). The discharge of the individual respondents as trustees of The New Jersey by the District Court in Ohio was conditioned upon the transfer of the reorganization proceedings to the District Court for the District of New Jersey. Order No. 343 (E. 4265) contemplated the appointment of a trustee for The New Jersey by a court of competent jurisdiction in anticipation of separating that company from the Erie Reorganization Proceedings and provided (E. 4267) that

> "• • • when and if such receiver or trustee is so appointed and qualified, the trustee of the property of